

THOMAS SWAB, JR.
ERIC SWAB
LOUISE ZUCCO, LINDA WENZEL, SANDRA JEFFERSON YONGE,
and CORINA ARCHULETA

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-115-A, 93-118-A, 93-133-A

Decided March 4, 1994

Appeal from the declination to recognize the results of a tribal election.

IBIA 93-115-A and 93-118-A dismissed; 93-133-A affirmed.

1. Administrative Procedure: Standing--Indians: Generally

A tribal member lacks standing to bring an administrative appeal for the tribe based on a personal assessment of what is or is not in the best interest of the tribe.

APPEARANCES: Appellants, pro sese; Irene Button, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Three appeals were filed with the Board of Indian Appeals (Board) from two decisions issued on July 22, 1993, by the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA). The decisions concern an October 1992 tribal election for the Lone Pine Paiute-Shoshone Indian Tribe (Tribe). The appellants are Thomas Swab, Jr.; Eric Swab; and Louise Zucco, Linda Wenzel, Sandra Jefferson Yonge, and Corina Archuleta. 1/ For the reasons discussed below, the Board of Indian Appeals (Board) dismisses Docket Nos. IBIA 93-115-A and 93-118-A, and affirms the decisions appealed in Docket No. IBIA 93-133-A.

1/ Julie Fritcher was also an appellant in Docket No. IBIA 93-133-A. Fritcher had earlier filed a separate notice of appeal, which was dismissed in Fritcher v. Sacramento Area Director, 24 IBIA 186 (1993), as being untimely. The Board found that Fritcher's participation in Docket No. IBIA 93-133-A was also untimely, and dismissed her as an appellant in an order dated Sept. 8, 1993.

Background

As discussed in Naylor v. Sacramento Area Director, 23 IBIA 76, 79 (1992), "[t]he Tribe suffers from deep internal divisions which, during the past [four] years have seriously affected the Tribe's ability to function." The Tribe remains split into two factions, which are almost equally divided. The factions have little, if anything, to do with each other, apparently to the point of not even attending the same meetings. During the pendency of the present appeal, the Tribe was so divided and so unable to function that there was a real possibility that water and sewer services to the reservation might be discontinued for failure to pay past-due bills.

The Area Director previously declined to recognize the results of tribal elections held on October 29, 1990, and August 23, 1991. The 1991 election was the subject of the decision in Naylor. The Tribe again attempted to hold an election on October 17, 1992. That election is the subject of this appeal.

Both the Superintendent, Central California Agency, BIA (Superintendent), and the Area Director discussed the lack of a tribal election ordinance in their decisions concerning the 1991 election. On August 15, 1992, while Naylor was pending before the Board, an election ordinance and voter eligibility criteria were adopted.

A copy of the election ordinance was sent to the Superintendent. By letter dated October 7, 1992, the Superintendent stated that he was "concerned that not all eligible persons may be allowed to participate," but otherwise took no action regarding the ordinance. 2/

The election was held as scheduled, using the new election ordinance and voters list. On January 20, 1993, the Superintendent determined that

2/ The Superintendent expressed concern that the Tribe was scheduling a new election while the appeal from the 1991 election was still pending before the Board. This concern probably arose at least in part because of the Board's holdings that BIA lacks authority to take action in a matter pending before the Board except to participate in the appeal as a party. See, e.g., Hammerberg v. Acting Portland Area Director, 24 IBIA 78 (1993), and cases cited therein.

However, in implementing the goals of tribal sovereignty and self-determination, the Board encourages the resolution of intra-tribal disputes through tribal means. These goals are particularly relevant when disputes arise over tribal elections. In an effort to encourage tribal resolution of election disputes, the Board has held that it will dismiss an appeal from an election when a valid election is held while the appeal is pending. See, e.g., Villegas v. Sacramento Area Director, 24 IBIA 150 (1993), and cases cited therein. Unfortunately here, the 1992 election was also challenged, resulting in the present appeal.

the election was invalid because voter participation was restricted and the certification of the election results was not signed by all members of the Election Committee.

Several appeals were taken to the Area Director from the Superintendent's decision. On July 22, 1993, the Area Director affirmed the decision, stating:

The determination of tribal membership and voter eligibility should be made by the total general membership. During the review, we did not locate documentation that the total general membership at the general council meeting approved the use of the general council concept form of government, the establishment of new membership or voter eligibility criteria or adoption of an election ordinance developed for the October 17th election. Therefore, the names of many previously recognized tribal members do not appear on the last eligible voters list received which is dated July 26, 1992. Although we do not disagree with the process to first determine tribal membership, identify eligible voters and enact election procedures prior to an election, we find that documentation to substantiate sufficient participation in the process is lacking. Without participation from both groups to establish membership and voter criteria, future elections may continue to be questioned and protested. Specifically, who is a tribal member and who the qualified voters are, will remain in doubt. The general council concept form of government is available for use by unorganized tribal groups and this process allows all who might reasonably qualify the opportunity to participate.

The Area Director noted that another copy of the election certification had been submitted which was signed by all Election Committee members. He therefore concluded that this defect had been cured.

Because of problems resulting from the lack of a functioning tribal government and his decision that the 1992 election was invalid, the Area Director issued a second decision on July 22, 1993, which was addressed to all interested parties, and mailed to all tribal members. This decision states:

As you know, it has been the policy of the [BIA], Sacramento Area, to remain at arms length from tribal governmental affairs, particularly with regard to tribal elections. Unfortunately, there are times when tribal governments become stifled by internal conflicts which affect the daily operations of a tribal government. This also affects our ability to continue a relationship with the tribe, for our purposes. When this happens, the [BIA] is often asked to make decisions which rightfully should be made by the tribal council or governing body but which cannot be made because of the differences between opposing tribal factions.

In addition to maintaining a policy of non-involvement in tribal political matters, we also, periodically, maintain a policy of recognizing those elected officials who were in office prior to an election dispute. This means going back to the last elected council whose election was uncontested. Therefore, by this letter, the [BIA] is re-recognizing those officials who were in office after the June 1989, election, the last uncontested election for the Lone Pine Indian Reservation. Those officers are:

* * * * *

The above persons will be recognized as the Interim Tribal Council for the primary purpose of preparing for and conducting a tribal election of officers. A secondary purpose will be served by allowing the Interim Council to conduct day-to-day tribal business on behalf of the Lone Pine Indian Community until a valid election results in the searing of elected officials. This is necessary to continue operations which may be affecting the health and safety of tribal members with regard to utilities, water and sewer, etc. The term of the interim council's recognition will be for a period of no more than 120 days to begin on or about August 2, 1993 and ending upon the seating of a newly elected council. [Emphasis in original.]

The Area Director then outlined a schedule that would allow the tribe to hold a new election and seat new officials within 120 days.

The three appeals presently under consideration each resulted from these two decisions. Thomas Swab, Jr., and Eric Swab filed a joint opening statement. Irene Button, a tribal member, filed a statement on her own behalf, opposing all appellants.

An objection was raised that the Area Director's decision to recognize the Interim Tribal Council deprived persons of the right to appeal. Finding that a functioning tribal government was a matter of public exigency, by order dated August 2, 1993, issued in Docket No. IBIA 93-115-A, the Board exercised its authority under 25 CFR 2.6(a) and 43 CFR 4.314(a) and placed this decision into immediate effect.

Discussion and Conclusions

[1] In Frease v. Sacramento Area Director, 17 IBIA 250, 256 (1989), the Board stated that "[t]he Department [of the Interior] has never recognized * * * any right of an individual tribal member to bring an action based on a personal assessment of what is or is not in the tribe's best interest." This position is based on the Department's responsibility to refrain from interfering in intra-tribal disputes. However, in Sundberg v. Acting Sacramento Area Director, 18 IBIA 207, 210 (1990), the Board found

that a tribal member who had sought office in a disputed tribal election had standing to appeal from a decision relating to that election.

All of the appellants were informed that they would be required to show their standing to bring an appeal. Thomas Swab, Jr., and Eric Swab argued:

Our appellant rights are based on three facts. The first factor of being seated by the current government as representatives and chairperson of the Local Committee. The second factor being under Federal Regulations see Title 25 of the Code of Federal Regulations, part 2, (25 CFR 2) and also referred to in letter dated Dec. 20, 1991 to Sandra Jefferson Yonge, Chairperson from Eddie F. Brown, Assistant Secretary - Indian Affairs. The third factor is found in the letter dated Nov. 7, 1991 to Ruth Buff, Election Committee, from Harold M. Brafford, Superintendent, see reference Federal Register Vol. 54, No. 27, Friday, February 10, 1989, Rules and Regulations.

(Opening Statement at unnumbered pages 3-4). Copies of the referenced letters were not included. Neither is an explanation offered as to what the "Local Committee" is or what "current government" appointed them to that committee. Both of the other references are to general appeals regulations.

Thomas Swab, Jr., and Eric Swab have not shown that they were candidates for office in the 1992 election. Nor have they shown any other basis for their standing to bring an appeal from the Area Director's decision. Therefore, the Board dismisses Docket Nos. IBIA 93-115-A and IBIA 93-118-A for lack of standing.

Although Linda Wenzel, Sandra Jefferson Yonge and Corina Archuleta made no attempt to show standing, the administrative record shows that they were candidates for office in the 1992 election and were, in fact, the persons certified to have won the election by the Election Committee. Accordingly, they have standing.

Louise Zucco also made no attempt to show standing. The record indicates that she was the Chairperson of the Election Committee for the 1992 election.

Zucco, Wenzel, Yonge and Archuleta filed a joint notice of appeal and statement of reasons, but did not file a brief. Under these circumstances, the Board finds it unnecessary to decide whether Zucco has standing, because her arguments are the same as those of Wenzel, Yonge, and Archuleta Cf. Moses v. Acting Portland Area Director, 24 IBIA 233 n.1 (1993).

In his first decision, the Area Director declined to recognize the results of the 1992 election because he was not able to locate documentation showing that the election ordinance and voter eligibility criteria were adopted at a General Council meeting by the total general membership.

He noted that the names of many individuals who had previously participated in tribal elections were not on the list of eligible voters. 3/

Appellants contend that different criteria for determining voter eligibility have been used in various prior elections. They state that in order to vote in the 1992 election, each individual had to complete a voter form to be placed on the voter list, and that it is improper for the Tribe to force anyone to participate in the voting process by including his/her name on the voting list without that person's having registered to vote. They further argue that everyone who registered was allowed to vote.

Appellants fail, however, to provide any evidence of the kind the Area Director found lacking; i.e., documentation that the election ordinance and voter eligibility criteria were adopted by the general membership, which would include both factions of the tribe. In the absence of such proof, appellants have not shown error in the Area Director's decision. The Board accordingly affirms the Area Director's decision declining to recognize the results of the 1992 election. 4/

Appellants also challenge the Area Director's second decision in which he re-recognized the individuals who were in office after the 1989 election, the last uncontested tribal election. Appellants allege that the individuals who were elected in 1989 as Vice-Chairperson and Secretary resigned and were replaced at a later election, 5/ and the Area Director identified the wrong individual as the person elected Secretary in 1989. They also attack his authority to recognize an Interim Tribal Council.

BIA is charged with recognizing the results of tribal elections in order to maintain the government-to-government relationship with a tribe. The policy followed here, re-recognizing the officials elected at the last uncontested election, is undeniably subject to problems and disputes, especially when the Area Director has to go back 4 years to find an uncontested election.

Under the unique circumstances of this case, a functioning tribal government was needed to conduct daily business necessary to protect the health

3/ A 2-page copy of the voter registration list is included in the administrative record. Unfortunately, the two pages are duplicates. Even so, it shows that people who had previously been politically involved with the Tribe were not listed as eligible voters. These people include Neddeen Naylor, Mary L. Wuester, and Noreen E. Sellberg, who were among the appellants, and candidates for office, in Naylor.

and safety of persons residing on the reservation. It was also necessary to allow the Tribe to hold another election. Although appellants clearly are not happy about the Area Director's decision, they have not shown that he exceeded his authority. All the tribal members need to do to reverse the decision is to put aside their factional differences and cooperate in developing a voter list and holding a valid election. However, as long as the tribal members continue as in the past to fight among themselves and refuse to work together for the good of the Tribe, there is little likelihood that they will be able to hold an election which BIA can recognize.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the two decisions issued by the Sacramento Area Director on July 22, 1993, are affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge